Supreme Court, U.S.
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No. 94-51

In The
Supreme Court of the United States

October Term, 1994

George Jones,
Petitioner,

v.

Simon & Schuster, Inc., and
Silver, Burdett & Ginn,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Virginia F. Metz*
Bruce L. Sendek
Butzel Long
150 West Jefferson, Suite 900
Detroit, Michigan 48226-4430
(313) 225-7000
Attorneys for Respondents

*Counsel of Record

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QUESTION PRESENTED

Whether this Court should deny certiorari to the United States Court of Appeals for the Sixth Circuit, which affirmed that the district court properly exercised its discretion in dismissing pursuant to Federal Rule of Civil Procedure 37?

STATEMENT PURSUANT TO RULE 29.1

Simon & Schuster, Inc. is a wholly-owned subsidiary of PCI's Holdings Corporation, which is a wholly-owned subsidiary of Paramount Communications, Inc., which is a wholly-owned subsidiary of Viacom, Inc. Silver Burdett & Ginn, Inc. is a wholly-owned subsidiary of Simon & Schuster, Inc.

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The Opinion of the United States Court of Appeals for the Sixth Circuit was not released for publication but is reproduced in full in Petitioner's Appendix at A-1. The Opinion of the United States District Court for the Eastern District of Michigan was not released for publication but is reproduced in full in Petitioner's Appendix at B-2.

SUMMARY OF ARGUMENT

Petitioner George Jones seeks review of the Sixth Circuit Court of Appeals' March 17, 1994 affirmance of an order dismissing his complaint. The district court dismissed under Federal Rule of Civil Procedure 37(b) as a result of Jones' repeated defiance of the district court's orders to provide discovery.

The pertinent issue on appeal was whether the district court abused its discretion in dismissing the complaint. The Sixth Circuit properly recognized that such orders are reviewable only for an abuse of discretion, citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). The Sixth Circuit concluded that the record demonstrated that for nearly two years, Jones and his counsel deliberately refused to comply with discovery orders and that the district court properly dismissed as a sanction of last resort.

Jones now petitions for a writ of certiorari for reasons that are practically incoherent and plainly disjointed. Essentially, Jones' petition is a diatribe that hardly touches on the Sixth Circuit's March 17, 1994 opinion. Instead, Jones expounds at length on extraneous matters such as liberal discovery standards under the Federal Rules, the district court's alleged failure to abide by Federal Rule of Civil Procedure 26, respondents' alleged failure to provide discovery to Jones, the concept of equal protection, and judicial responsibility in district courts.

Likewise, Jones' list of "questions presented" is not connected to the Sixth Circuit's opinion. In ad hominem fashion, the so-called issues summarize Jones' complaints about the magistrate judge, the district court's alleged failure to enforce discovery against respondents, the district court's denial of a motion for recusal, and petitioner's alleged denial of due process and equal protection. These matters are unrelated to the Sixth Circuit opinion Jones is requesting the Supreme Court to review. Jones simply does not focus on the fundamental question of whether or not the dismissal was a proper exercise of the district court's discretion. Based on the record in the district court, Jones' Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

George Jones was employed by Silver, Burdett & Ginn to sell textbooks until November 1, 1989, at which time he was employed as a textbook salesperson for Globe Book Company, Inc. Both companies are affiliates of Simon & Schuster, Inc. On December 18, 1989, Jones' employment was terminated because he had engaged in substantial improprieties in obtaining textbooks orders. Jones filed suit in March, 1991, to contest the termination.

Throughout the litigation, Jones repeatedly failed to respond to appropriate discovery requests, to answer certain deposition questions, to appear for properly noticed depositions and to comply with discovery orders issued by the magistrate judge and district court. Jones also filed three improper interlocutory appeals with the Sixth Circuit, was sanctioned by the magistrate judge and district court for filing a frivolous motion, had costs assessed against him on several occasions due to abuses of the discovery process, and brazenly disobeyed applicable court rules.

Jones' continuous refusal to comply with the district court's discovery orders caused defendants to file two motions to dismiss. The first motion was denied by the district court, but Jones was strongly warned to comply with specified parts of the district court's prior

discovery orders by a date certain or have his case dismissed. When Jones failed to comply with this order as well, defendants filed a second motion to dismiss. This motion was granted by the district court and affirmed by the Sixth Circuit.

The procedural morass created by Jones' tactics makes it difficult to provide a chronological discussion of the various motions, orders and appeals in this case. For organization, defendants will divide the discussion into three sections. The first section will address the four discovery rulings of the magistrate judge. The second section will address the various appeals taken by Jones to both the district court and to the Sixth Circuit and the orders issued by the district court. The third section will discuss the motions to dismiss and the ultimate dismissal of this case by the district court.

A. The Magistrate Judge's Orders

1. The Magistrate Judge's First Order

Shortly after defendants answered the complaint, Jones filed a motion for more definite statement. Since Jones had failed to comply with the local court rule that requires an attorney to seek concurrence before filing a motion, the magistrate judge denied Jones' motion and directed Jones' counsel to confer with defense counsel regarding the

substance of his motion. In addition, the magistrate judge ruled that defendants could bring a motion for costs and fees after the parties consulted. Four months then passed, and Jones took no action to confer with defense counsel regarding his motion. Defendants accordingly filed a motion seeking to recover their costs and attorney's fees incurred in responding to Jones' motion. The magistrate judge entered an order awarding defendants $300 in Rule 11 sanctions. The magistrate judge based his ruling on the fact that Jones' counsel had filed a frivolous motion and violated Rule 11 of the Federal Rules of Civil Procedure. Despite the issuance of this order, the costs awarded were never paid.

2. The Breakdown in Discovery and the Magistrate Judge's Second Order

Defendants first filed a discovery motion after Jones refused to answer certain questions during his deposition.[1] Defendants' second discovery motion sought to compel Jones to answer requests for admissions. Defendants' third discovery motion sought to compel Jones to

[1] The Jones deposition, which took place on July 24 and 25, 1991, was not concluded on those dates. The continuation of Jones' deposition was scheduled for September 17 and 18, 1991, but had to be canceled because Jones filed a motion seeking to terminate his deposition, which was ultimately denied by the magistrate judge. As will be discussed below, all subsequent attempts to schedule Jones' deposition were scuttled when Jones refused to appear. As a consequence, Jones' deposition was never continued or completed prior to the dismissal of this case.

fully respond to defendants' interrogatories and document requests. All three of these discovery motions were referred to the magistrate judge.

On October 31, 1991, the magistrate judge issued an order resolving all of the pending discovery motions. Jones was ordered to answer defendants' questions at the continuation of his deposition and defendants were awarded $1,092.50 in costs payable by Jones' counsel because Jones' counsel had improperly directed Jones not to answer the deposition questions. The magistrate judge also directed Jones to respond to defendants' requested admissions and several of defendants' interrogatories and document requests and awarded defendants additional costs of $633.33 payable by Jones' counsel because "there was no substantial justification" for Jones' refusal to answer defendants' discovery requests.

3. Another Breakdown in Discovery and the Magistrate's Third Order

As a result of the volume of discovery motions that had been filed, which held up the continuation of Jones' deposition until the motions could be resolved, the district court set a new discovery cutoff of February 26, 1992. Defendants then noticed the continuation of Jones' deposition for November 21, 1991. Jones canceled this deposition at the last moment, after defendants' representative had flown from Chicago to Detroit to attend the deposition. Defendants therefore filed a **second**

motion seeking to compel Jones' deposition and for costs. On January 21, 1992, the magistrate granted this motion and ordered Jones' counsel to pay defendants $1,281.94 in costs no later than February 20, 1992 unless Jones' counsel submitted a specified affidavit. Jones' counsel never submitted the affidavit. As with the prior award of costs, the costs remain unpaid.

At this point in the proceedings, the district court extended the discovery cutoff until June 26, 1992 due to the fact that discovery had been on hold until the pending motions were resolved.

4. Discovery Breaks Down Again and the Magistrate's Fourth Order

After prevailing on their second motion to compel deposition, defendants re-noticed the continued deposition of Jones for March 4, 1992. Once again, Jones did not appear for his properly noticed deposition. Defendants accordingly filed a **third** motion seeking to compel Jones' deposition testimony and for costs.

On April 22, 1992, the magistrate judge conducted a hearing regarding defendants' third motion to compel Jones' deposition testimony and issued a ruling from the bench in favor of defendants regarding the substantive issues raised by their motion. In addition, the magistrate judge scheduled an evidentiary hearing with Jones present to determine

whether Jones or his counsel would be required to pay defendants' costs because Jones had again failed to appear for a properly noticed deposition.

On October 9, 1992, after conducting the evidentiary hearing, the magistrate judge issued his fourth order. In his fourth order, the magistrate judge once again ordered Jones to appear for his deposition. In the same order, the magistrate judge awarded defendants $1,170 in costs payable by November 7, 1992 and ruled that Jones and his counsel could decide among themselves how to apportion the payment. Just as with every other order issued by the magistrate judge, the costs awarded in this order have never been paid.

5. **Summary**

In summary, the magistrate judge issued four discovery orders in this case, none of which has been complied with by Jones:

1. An October 31, 1991 order holding that Jones had filed a frivolous motion for more definite statement and awarding defendants $300 in costs as Rule 11 sanctions.

2. An October 31, 1991 order compelling Jones to appear for his deposition and to respond to deposition questions, certain interrogatories and admissions and awarding defendants $1,092.50 and $633.33 in costs.

3. A January 21, 1992 order compelling Jones a second time to appear for his deposition and awarding defendants $1,281.94 in costs.

4. An October 9, 1992 order compelling Jones to appear a third time for his deposition and awarding defendants $1,170 in costs.

B. Jones' Objections to the Magistrate's Orders and his First Two Interlocutory Appeals to the Sixth Circuit

Jones filed objections with the district court regarding all four of the magistrate judge's orders summarized above. Defendants will discuss the district court's rulings on these objections, as well as the motions and interlocutory appeals that followed, in the order in which they occurred.

1. The District Court's First Order and Jones' First Sixth Circuit Appeal

On January 22, 1992, the district court judge issued an order affirming the magistrate judge's first two orders compelling discovery and awarding $300, $1,092.50 and $633.33 in costs. Accordingly, Jones' counsel had to pay defendants all of the costs awarded by the magistrate judge's first two orders by February 21, 1992 and to provide seven types of discovery materials to defendants during February of 1992. Despite the issuance of this order, the awarded costs have never been paid, and the discovery mandated by the order was never provided.

Jones responded to the district court's first order by filing a Petition for Writ of Prohibition and/or Writ of Mandamus dated February 20, 1992 with the Sixth Circuit. This petition also addressed the magistrate judge's

third discovery Order dated January 21, 1992, which had been appealed to the district court but not yet decided. In his petition, Jones asked the Sixth Circuit to reverse all of the discovery rulings issued at that time in defendants' favor and to remove the district court judge and the magistrate judge from his case. On March 24, 1992, the Sixth Circuit issued an order denying Jones' petition. (Petitioner's Appendix A-10)

2. The District Court's Second Order

As indicated, Jones also filed objections to the magistrate judge's third discovery order, which directed Jones a second time to appear for his deposition and awarded defendants $1,281.94 in costs. Jones' objections addressed not only the magistrate judge's third discovery order, but also the magistrate judge's first discovery orders, even though they had already been affirmed by the district court. On June 29, 1992, the district court issued an order affirming the third discovery order and requiring Jones' counsel to pay defendants the $1,281.94 in costs awarded in the magistrate judge's third order by July 29, 1992.

3. Jones' Motion for Relief and the District Court's Third Order

Having failed to convince either the district court or the Sixth Circuit to overturn the magistrate judge's discovery orders, Jones filed a Motion for Relief from Judgment or Orders with the district court on June

4, 1992. In this motion, Jones again sought relief from two prior discovery Orders. First, Jones asked the district court for a third time to reverse the magistrate judge's second order dated October 31, 1991 even though this order had already been reviewed and affirmed by the district court twice and even though Jones had not filed a motion with the district court in a timely fashion seeking rehearing. Second, Jones asked the district court to reverse the magistrate judge's third order dated January 21, 1992, which Jones had already appealed to the district court but which at that point had not yet been decided.

The district court denied Jones' motion for relief on August 24, 1992. (Petitioner's Appendix B-12) By issuing this order, the district court once again denied Jones' attempt to set aside the magistrate judge's first three discovery orders with which Jones had consistently refused to comply. Notwithstanding the magistrate judge's order, however, no money was paid to defendants, and Jones still failed to provide the mandated discovery.

4. Jones' Second Sixth Circuit Appeal and Motion to Recuse the District Court Judge and the Magistrate Judge

Jones responded to the district court's third order dated August 24, 1992 by filing a **second** interlocutory appeal with the Sixth Circuit on September 11, 1992. The purpose of this appeal was to circumvent the

district court's first and third orders and thereby reverse the magistrate judge's second and third discovery orders. Defendants filed a motion to dismiss this appeal for lack of jurisdiction and the Sixth Circuit agreed:

> The orders that plaintiff seeks to have the court review are essentially discovery orders. It is well established in this circuit that discovery orders are non-final, non-appealable orders. (Petitioner's Appendix A-8)

In addition to filing his second Sixth Circuit appeal, Jones also filed a motion on September 29, 1992 with the district court seeking the recusal of the district court judge and the magistrate judge. In essence, this motion was a repackaged, retitled version of the petition that Jones had earlier filed with the Sixth Circuit in his first appeal dated February of 1992. The district court denied Jones' motion seeking recusal on December 21, 1991. (Petitioner's Appendix B-9)

C. Defendants' Motions to Dismiss and Jones' Third Interlocutory Appeal

1. The District Court's Denial of the First Motion to Dismiss

On March 6, 1992 -- after Jones had twice failed to proceed with his deposition, failed to comply with the magistrate judge's first three orders, and failed to comply with the seven discovery mandates affirmed in the district court's order dated January 22, 1992 -- defendants filed their first motion to dismiss.

On January 4, 1993, the district court denied defendants' motion to dismiss but affirmed the magistrate judge's fourth discovery order dated October 9, 1992. (Petitioner's Appendix B-4) Although ruling in Jones' favor regarding the motion to dismiss, the district court stated:

> Turning to the relevant factors, there can be little doubt that defendants have been prejudiced by the inability to complete discovery and that the less drastic sanctions imposed have not been effective. In addition, plaintiff has failed to show that the failure to appear for deposition was due to "inability," rather than "willfulness, bad faith or fault," *Regional Refuse, supra.*
>
> * * *
>
> For the sake of clarity, the Court indicates that the amount of costs and fees already awarded to defendants as sanctions total $4,241.27.

In this same order, the district court required Jones to provide the following discovery:

> (1) provide all existing 1982 and 1990 state, federal and local tax returns to defense counsel no later than January 13, 1993, and
>
> (2) answer defendants' Request for Admission No. 1 and No. 2 no later than January 13, 1993, or they will be deemed to have been admitted.
>
> Failure to appear for deposition or provide the above-ordered discovery will result in the dismissal of this case. (emphasis added)

2. Defendants' Second Motion to Dismiss and Jones' Third Sixth Circuit Appeal

Jones also failed to comply with the discovery ordered by the district court on January 4, 1993. Defendants accordingly filed a second motion to dismiss dated January 19, 1993.[2]

In response to defendants' motion, Jones filed a brief in the district court stating for the first time that he had filed a **third** interlocutory appeal with the Sixth Circuit regarding the district court's January 4, 1993 order. Jones filed a separate brief with the district court in response to defendants' motion in which he did not even attempt to assert that he had complied with the district court's January 4, 1993 order.

Jones' third interlocutory appeal to the Sixth Circuit was an attempt to reverse those parts of the district court's January 4, 1993 order that had (1) affirmed the magistrate judge's fourth discovery order dated October 9, 1992 and (2) ordered Jones to provide discovery to defendants by January 13, 1993. On March 11, 1993, the Sixth Circuit issued an order granting defendants' motion to dismiss Jones' third appeal. (Petitioner's Appendix A-6) The Sixth Circuit stated in its order:

[2] In this motion, defendants pointed out that not only had Jones not provided the discovery ordered on January 4, 1993, but also that all of the other discovery that had been mandated by the magistrate judge and district court had likewise never been provided by Jones.

> The order which plaintiff seeks to have this court review is a non-final, non-appealable discovery order. * * * The court notes that this is the third time plaintiff has been before the court seeking review of non-final orders. * * * Plaintiff is cautioned to consider carefully whether appellate jurisdiction exists prior to filing another notice of appeal in this action.

3. The District Court's Dismissal Order

On February 26, 1993, the district court issued an order dismissing Jones' lawsuit. (Petitioner's Appendix B-2) In this order, the district court stated:

> Plaintiff does not deny that he has not provided the ordered discovery and does not represent that it will be produced or that he will appear for his deposition. Instead, on January 20, 1993, plaintiff filed a Notice of Appeal from this Court's January 4, 1993 Order. It is apparent that this is merely an attempt to further delay progress in this case. * * * [P]laintiff is on notice that this is not a proper appeal. * * * While a proper notice of appeal generally divests the district court of jurisdiction, the Sixth Circuit has held that a notice of appeal from a plainly non-appealable order may be ignored by the district court.

It is this order that was affirmed by the Sixth Circuit on March 17, 1994 and is the subject of this petition. (Petitioner's Appendix A-1)

REASONS FOR DENYING THE WRIT

The only issues properly addressed by this petition are those arising out of the Sixth Circuit March 17, 1994 opinion that affirmed dismissal of Jones' lawsuit after Jones repeatedly failed to comply with several

orders of the magistrate judge and district court and after Jones filed numerous frivolous motions and appeals with both the district court and the Sixth Circuit.

A. The Proper Standard of Review

It is well-established law that district court orders of dismissal issued under Federal Rule of Civil Procedure 37 are reviewable by appellate courts only for an abuse of discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, (1976); *Regional Refuse Systems, Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988); *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 985 (6th Cir. 1988); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990). Defendants submit that the facts of this case applied to the controlling law clearly demonstrate that there was no abuse of discretion.

Three Sixth Circuit cases set forth the factors that are to be considered when an order of dismissal is reviewed by an appellate court:

1. Whether the dismissed party's failure to comply with the district court's order was due to willfulness/bad faith/fault or an inability to comply;

2. Whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery;

3. Whether the dismissed party was warned that failure to cooperate could lead to dismissal; and

4. Whether less drastic sanctions were imposed or considered before dismissal was ordered.

Bank One of Cleveland, 916 F.2d at 1073, 1079; *Taylor*, 861 F.2d at 986; *Regional Refuse Systems*, 842 F.2d at 153, 155.

B. The Facts Establish that Jones Acted Egregiously and that Jones' Conduct Was Willful and in Bad Faith

Jones and his counsel have demonstrated a complete disregard for discovery rules, local rules, appellate rules and court orders. These actions are particularly egregious because they happened, not just once, but repeatedly despite the magistrate judge's and district court's warnings.

Jones' misconduct throughout this litigation fully supports the district court's order of dismissal. The order was not entered until Jones had been given repeated opportunities to comply with the court rules and orders. Likewise, the order was not entered until after Jones was sanctioned, repeatedly subjected to Rule 37 costs and warned of the consequences of failing to comply with the court rules and orders. There is no doubt under the circumstances that Jones' conduct was willful and in bad faith and not the result of inability to comply, which Jones has never claimed.

As indicated in the Statement of Facts, Jones' misconduct began almost immediately with the filing of a procedurally and substantively

defective motion for more definite statement regarding defendants' answer. Not only did Jones violate the local court rule by not seeking the concurrence of defense counsel before filing his motion, but he also ignored Federal Rule of Civil Procedure 12(e), which does not permit the filing of such a motion regarding an answer. He also did not follow the magistrate judge's direction to confer with defense counsel. Defendants were awarded $300 in Rule 11 sanctions as a "deterrent against plaintiff's counsel filing frivolous motions in the future." Unfortunately, this very early warning from the magistrate judge did nothing to deter Jones from engaging in a continuing pattern of misconduct.

Thereafter, Jones improperly refused to respond to deposition questions and then failed to proceed with his deposition notwithstanding the filing of three motions to compel his deposition, all of which resulted in rulings in favor of defendants by both the magistrate judge and the district court. Jones also refused to answer request for admissions, to provide certain tax documents and to respond to several other discovery requests, again in violation of orders entered by both the magistrate judge and the district court. The magistrate judge's orders on all of these discovery issues resulted in the imposition of substantial costs, but Jones

still did not modify his pattern of misconduct. The costs awarded were also never paid.

Jones' efforts to overturn the magistrate judge's rulings further establish misconduct. Jones filed objections with the district court regarding all four of the magistrate judge's discovery orders. If this were the only steps taken by Jones, defendants would obviously not object because Jones had the right to file objections and to have the rulings reviewed by the district court. But Jones did not stop there. Instead, when the district court affirmed the magistrate judge's discovery orders, Jones still refused to comply with the orders. In addition, Jones took a series of manifestly impermissible steps that were designed to continue his disruption of the discovery process:

1. Jones filed an interlocutory appeal with the Sixth Circuit in the form of a Petition for Writ of Prohibition and/or Writ of Mandamus seeking to reverse all of the discovery orders in defendants' favor and to have the district court judge and magistrate judge removed from the case.

2. When this Sixth Circuit rejected Jones' petition, noting that his appeal was procedurally defective and that he had provided no basis for removing the district court judge and the magistrate judge from the case, Jones responded by filing a motion for rehearing that was likewise denied.

3. Jones then again attempted to overturn these initial discovery rulings by appealing them again to the district court when he filed objections regarding the magistrate judge's third discovery order.

4. Then, when the district court reiterated its earlier rulings and affirmed the third discovery order, Jones filed a Motion for Relief from Judgment or Orders which asked the district court for a third time to overturn the magistrate judge's discovery rulings. The district court refused, but Jones was still undeterred.

5. Jones responded by filing a second procedurally improper interlocutory appeal with the Sixth Circuit that essentially challenged the same orders as his first appeal and that was again dismissed. He also filed a motion with the district court to recuse the district court judge and the magistrate judge, a motion that likewise mirrored his first appeal to the Sixth Circuit and was denied by the district court.

Jones' trail of discovery and procedural abu s did not go unnoticed by the district court. At first, the district court mildly admonished Jones in June of 1992 by pointing out that his repeated attempts to overturn the same orders of the magistrate judge had already been rejected by the district court. The district court reiterated this point in rejecting Jones' motion for relief two months later. Then, when Jones raised the same issues a third time, the district court underscored Jones' continuing misconduct by noting that the same case law that supported its denial of Jones' motion to recuse had already been provided to Jones by the Sixth Circuit when it dismissed his first interlocutory appeal.

Jones still did not get the message. He continued to refuse to comply with the orders regarding admissions, documents and interrogatory

answers, and he continued to refuse to proceed with his deposition. Defendants therefore had no alternative but to file a motion to dismiss.

The district court denied this motion on January 4, 1993 and gave Jones yet another chance to comply with the magistrate judge's and district court's orders. Jones was given a date certain by which he had to comply with the discovery previously ordered by the magistrate judge and district court. The district court also told Jones in clear and unequivocal language that his case would be dismissed if he failed to comply with this deadline.

Jones once again ignored the deadline and once again tried to avoid compliance by filing a procedurally defective interlocutory appeal, after the district court deadline had been missed. This appeal to the Sixth Circuit was again dismissed with an admonishment that this was Jones' third improper appeal.

After defendants filed their second motion to dismiss based, Jones did not even attempt to argue that he had not violated the terms of the January 4, 1993 order. Thus, the district court properly dismissed the case.

At the time of dismissal, Jones had over a sixteen-month period consistently refused to comply with the magistrate judge's four discovery

orders; he had appealed all four of the magistrate judge's orders to the district court; the district court had denied all four of Jones' appeals; Jones had refused to comply with any of the district court's orders; Jones had filed three unmeritorious, interlocutory appeals with the Sixth Circuit, all of which had been denied; Jones had filed one motion for rehearing with the Sixth Circuit that had been denied; Jones had filed a motion for relief with the district court that repeated earlier-filed motions with both the Sixth Circuit and the district court; Jones had filed a motion to recuse with the district court that repeated his first appeal to the Sixth Circuit; and Jones had refused to comply with the district court's final order setting a January 13, 1993 discovery deadline. Moreover, at this same point in time, Jones had refused to comply with any of the orders awarding defendants a total of $4,241,27 in costs.

One of the factors considered by the Sixth Circuit was whether Jones' failure to comply with the district court's orders was due to inability or was the result of his own willfulness, bad faith or fault. The burden of proof was on Jones to establish that his failure to comply with the district court's orders was due to inability. *Taylor*, 861 F.2d at 987. If the repeated filing of procedurally and substantively deficient motions and appeals, as well as the repeated refusal to comply with court orders

notwithstanding admonishments and a clear warning regarding the consequences of noncompliance, does not constitute fault, bad faith or willfulness, it is not clear what does. Significantly, Jones has never claimed that he was not able to comply with the orders.

In *National Hockey League*, 427 U.S. at 640, this Court found that there was no abuse of discretion in dismissing a lawsuit where the district court had concluded that after "seventeen months where crucial interrogatories remained substantially unanswered . . . the court must and does conclude that the conduct of the plaintiffs demonstrated the callous disregard of responsibilities counsel owe to the court and to their opponents." This Court reversed the Third Circuit and held:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. *Id.* at 643.

In the instant case, where crucial discovery was not completed over a sixteen-month time period, the *National Hockey League* case is directly on point.

In *Bank One of Cleveland*, where the defendants were proceeding pro se, the Sixth Circuit upheld the entry of a default judgment against the defendants using the same analysis it utilizes for dismissing a

plaintiff's action. In allowing the default to stand, the court noted -- exactly parallel to the facts in this case -- that the defaulted defendants did not "allege an inability to comply with the bank's court-sanctioned discovery requests." *Bank One of Cleveland*, 916 F.2d at 1079. The Sixth Circuit therefore found that the defendants' "repeated failure to appear on numerous occasions suggests their 'willfulness, bad faith, or fault.'" *Id.*

The Sixth Circuit upheld the dismissal of plaintiffs' complaint in *Regional Refuse Systems*. After discussing the distinction between an inability to comply with a court order as compared with a bad faith refusal to comply with a court order, the Six Circuit concluded that it was the thrust of the case law "to presume that, if a party has the ability to comply with a discovery order and does not, dismissal is not as abuse of discretion." *Regional Refuse Systems*, 842 F.2d at 154. See also *Taylor*, 861 F.2d at 985. The same presumption should apply in the instant case.

C. Defendants Were Clearly Prejudiced

It is clear that defendants were greatly prejudiced by Jones' misconduct. The district court properly found in its order that "there can be little doubt that defendants have been prejudiced by the inability to complete discovery . . . ." Similarly, the record amply reflects that Jones'

misconduct stopped defendants from completing Jones' deposition despite the passage of sixteen months and that defendants were unable to complete any other discovery during this same time period due to Jones' refusal to comply with repeated orders requiring discovery. In addition to the fact that discovery abruptly halted and never resumed, defendants were also seriously prejudiced by being put to a great deal of expense. Jones' misconduct also potentially imposed significant additional interest costs on defendants by needlessly extending the litigation.

In *Taylor*, 861 F.2d at 986, the Sixth Circuit court affirmed the dismissal of an action under parallel circumstances, explaining:

> [I]t is clear that the defendants were materially prejudiced by the plaintiffs' repeated failure to make their expert available for deposition. Not only were the defendants forced to incur additional legal expenses in attempting to obtain the deposition, but also . . . the dilatory tactics of the plaintiffs effectively prevented the defendants from engaging in further discovery after the deposition because of the close proximity to the trial date.

Similarly, in *Regional Refuse Systems*, 842 F.2d at 155, the Sixth Circuit upheld the dismissal of an action in circumstances similar to the instant case:

> Certainly the many defendants were put to a great deal of expense, to little avail, in the efforts to procure Dzina's attendance at his own deposition, and to wring some substance out of his vague and evasive answers. The defendants know little more now than they did when they

> began about how the plaintiffs intended to prove their case, and the prejudice caused by Dzina's conduct is therefore clear.

In this case, defendants likewise know little more about Jones' claims and the facts surrounding those claims than they did when this lawsuit was first filed.

Defendants' opportunity to gather facts was greatly diminished by Jones' conduct. Memories of witnesses will have faded, witnesses who left the defendants or worked for other companies will become increasingly difficult to locate, documents may have disappeared or been destroyed, and the like. The trail is clearly quite cold and has been made so by Jones' misconduct.

D. Jones Was Explicitly Warned

The record is likewise clear that Jones was amply warned that his failure to cooperate could lead to the dismissal of his case. In its order dated January 4, 1993, the district court stated: "Failure to appear for deposition or provide the above-ordered discovery will result in dismissal of this case." Moreover, in its final order, the district court properly noted that its order dated January 4, 1993 had "specifically advised that failure to cooperate in discovery would result in dismissal." Nothing more than this clear language is required by the case law.

In this regard, the Sixth Circuit stated:

> As the district court acknowledged, the dismissal of an action is a sanction of last resort." *Regional Refuse Systems, Inc., v Inland Reclamation Co.*, 842 F2d 150, 153 (6th Cir. 1988). Where, however, "a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion." *Id.* at 154. (Petitioner's Appendix A-1)

E. <u>Less Drastic Sanctions Were First Imposed</u>

Another factor that is often considered is whether the district court imposed or considered a less drastic sanction than dismissal. In the instant case this obviously occurred.

The magistrate judge awarded Rule 11 sanctions in favor of defendants specifically as a "deterrent against" the filing of additional frivolous motions by Jones. In addition, the magistrate judge awarded substantial costs in favor of defendants on several occasions because there was no justification for the delay that was occurring regarding discovery. Moreover, in all instances, the district court affirmed these rulings by the magistrate judge. After Jones and his counsel consistently refused to comply with any order issued or to pay defendants any of the money awarded to them, the district court had no realistic alternative but to dismiss this action in order to preserve the integrity of the federal courts.

The prior decisions of the Sixth Circuit underscore the propriety of the dismissal of Jones' complaint. Affirming the dismissal of an action when the plaintiffs failed to proceed with discovery, the Sixth Circuit noted with approval in *Taylor*, 861 F.2d at 986 -- parallel to the instant case -- that the district court had previously imposed the lesser sanction of costs. Moreover, in *Regional Refuse Systems*, 842 F.2d at 156, the district court did not even consider a lesser sanction than dismissal, and there was a finding on appeal that the misconduct was executed with a "veneer of good intentions," which is certainly not present in this case. Nonetheless, this court affirmed the dismissal, explaining:

> It has been held that "[t]he district court . . . enjoys authority to impose this sanction even where 'a less drastic sanction might have been entertained.'"
>
> * * *
>
> While it would be inappropriate to dismiss without considering the severity of this sanction and the availability of lesser sanctions, it is not an abuse of discretion to dismiss, even though other sanctions might be workable, if dismissal is supportable on the facts. Dismissal is generally imposed only for egregious misconduct, such as **repeated** failure to appear for deposition . . . . Id. at 155. (Emphasis added).

Finally, in *Bank One of Cleveland*, 916 F.2d at 1079, the Sixth Circuit upheld a default judgment that had been entered against the defendants after finding that their lack of response to the district court's

order to compel discovery "demonstrates the futility of any lesser sanctions."

F. **The Sixth Circuit Properly Explained Its Rationale**

This is clearly not a case in which there is any doubt as to the substantial reasons why the district court dismissed Jones' lawsuit. The Sixth Circuit's opinion includes a detailed summary of the events which led to dismissal. Further, the record establishes that the district court made a specific finding that defendants had been prejudiced, that less drastic sanctions had been unsuccessfully imposed and that this was not a case of a plaintiff's inability to comply with court orders. Finally, in its last order, the district court judge also found that Jones did not deny that he had not provided the court-mandated discovery, that Jones did not represent that he would comply with any court order and that Jones had attempted to further delay the case by filing a frivolous third appeal with the Sixth Circuit instead of providing the mandated discovery.

G. **There Is No Merit to Jones' Claims**

Jones' petition does not address any of the factors relevant to the issue on appeal and does not provide any reason why the order of dismissal should be overturned. The reason for these omissions is clear -- there is nothing Jones can say in his favor. As the petitioner, it is Jones'

burden to persuade the Supreme Court that there exists a compelling reason to grant his writ. He clearly has not, and cannot, do so.

CONCLUSION

Respondents submit that there is no reason for the Supreme Court to review the Sixth Circuit's opinion and that Jones' petition should be denied.

Respectfully submitted,

BUTZEL LONG

VIRGINIA F. METZ*
BRUCE L. SENDEK
Suite 900
150 West Jefferson
Detroit Michigan 48226-4430
(313) 225-7000

Attorneys for Respondents

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*Counsel of Record